BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion in this case on November 12, 1943. The opinion is set forth on pages 141-8 of the Record and is reported in 138 F. (2d) 663.

Jurisdiction

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Seventh Circuit on November 12, 1943. A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and questions presented, see this petition (pp. 1 to 5).

Specification of Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the order dismissing petitioner's sworn Amended Complaint.

2. The Circuit Court of Appeals for the Seventh Circuit erred in not holding that petitioner's sworn Amended Complaint stated a valid cause of action.

ARGUMENT.

It is submitted that petitioner's sworn Amended Complaint states a valid cause of action and that it is beyond doubt and dispute that petitioner, as ancillary administrator in Illinois, may recover and administer any assets belonging to the decedent which are recoverable by a direct *in personam* proceeding in the Federal Court in Illinois in which the respondent corporation is properly sued and served.

This Court has held in *New England Life Insurance Co.* v. *Woodward,* 111 U. S. 138, and *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, that a suit may be brought by a decedent's administrator to recover money belonging to the decedent against a non-resident debtor temporarily within the state, or a corporation doing business there, regardless of where such corporation may have been incorporated or where its principal office may be.

In the *New England* case an ancillary administration was commenced in Illinois without any tangible assets whatever, the sole property consisting of a claim upon an insurance policy issued by the New England Mutual Life Insurance Company, which was a foreign corporation authorized to do business in Illinois. In an opinion which has been cited many times, this Court held that the claim against the Insurance Company was sufficient upon which to found the Illinois ancillary administration, without any other physical assets in Illinois, and that the action to recover money upon the policy could be maintained in the Federal District Court in Illinois, even though the

Insurance Company (like the respondent in this case) was a foreign corporation doing business in Illinois. This Court said (p. 145):

> "The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this Court has recently affirmed in *Wyman* v. *Halstead*, 109 U. S. 654. But the reason why the State which charters a corporation is its domicil in reference to debts which it owes, is because there only can it be sued or found for the service of process. This is now changed in cases like the present; and *in the courts of the United States it is held, that a corporation of one State doing business in another, is suable in the courts of the United States established in the latter State, if the laws of that State so provide, and in the manner provided by those laws.* *Lafayette Insurance Company* v. *French*, 18 How. 404; *Railroad Company* v. *Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad Company* v. *Koontz*, 104 U. S. 5, 10." (Italics added.)
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> "There is nothing in the foregoing views which is in conflict with what was decided in *Wyman* v. *Halstead, ubi supra.* In consonance with what was said in that case, payment of this debt to the administrator appointed in Illinois will be good against any administrator appointed elsewhere; and the defendant will be protected in paying this judgment, * * *"

It will be particularly noted that in the *New England* case the defendant was incorporated in a foreign state (Massachusetts), but was authorized to do business and was therefore held to be subject to the Federal court's jurisdiction in the state (Illinois) where suit was brought, exactly like respondent in the case at bar.

The *New England* case was followed, in *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, as settled American Law. There the defendant company was qualified to do business in Hawaii; but the defendant contended that since it was incorporated in the State of New York, only that state had jurisdiction over it, even though it was properly sued and served in the Federal court in Hawaii. This Court said (p. 312):

> "In substance, the contention of the plaintiff in error (defendant Insurance Company) is that on the facts above cited the *situs* of the indebtedness upon the policy in question was an asset solely within the jurisdiction of the State of New York and of its courts, and that the defendant had not its *situs* in the territory of Hawaii, the domicil of the deceased, where the policy was delivered and where it was actually present. *But this contention, in effect, has been decided by this Court to be unsound. New England Life Insurance Co.* v. *Woodward*, 111 U. S. 138." (Italics added.)

The lower Federal courts have uniformly cited and followed the ruling in the *New England* case, including the United States Circuit Court of Appeals of the Ninth Circuit:

> *Smith* v. *New York Life Insurance Co.*, 57 F. 133; 67 F. 694;
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> *London, Paris & American Bank* v. *Aronstein*, 117 F. 601.

In the *Smith* case, letters of ancillary administration were granted in California; and the administration brought suit against the Insurance Company, which was a foreign corporation (New York) doing business in California. In the meantime a domiciliary administrator had been appointed in Illinois, and had there brought suit against the

defendant. It was held by the Circuit Court for the Northern District of California and affirmed by the Circuit Court of Appeals for the Ninth Circuit that the pendency of the Illinois suit was no bar to the California action, since the Federal Court in California had complete jurisdiction of the defendant New York corporation in California. The Federal Court specifically stated that it was *the duty of the ancillary administrator* in California, when there is a deficiency of assets, to sue and recover all goods, chattels, rights or credits *recoverable in the state of his appointment.*

In the *London, Paris & American Bank* case a California executor was held to be entitled to maintain an action in California against a British corporation for the transfer of assets consisting of stock belonging to decedent. This was on the theory that the California law required foreign corporations doing business there to maintain transfer agents in that state. The Ninth Circuit Court of Appeals in both these cases cited and relied on *New England Life Insurance Co.* v. *Woodward.*

This has likewise been the universal rule in the several states.

Fox v. *Carr*, 16 Hun. (N. Y.) 434;
Equitable Life Assurance v. *Voegl*, 76 Ala. 441;
Saunders v. *Weston*, 74 Me. 85;
Williams v. *Williams*, 79 N. C. 417.

We have no doubt that respondent will attempt to distinguish the case of *New England Mutual Life Insurance Co.* v. *Woodward*, 111 U. S. 138, and all of the numerous other cases above cited holding that the defendant may be sued by an Illinois administrator in an Illinois Federal

Court to recover money due the decedent, upon the ground that in the *New England* case intangible property (money) was involved, whereas in the case at bar tangible property is involved.

That this distinction is without any merit whatever is shown by the cases enunciating the well-known principle that in an action *in personam* a defendant may be required (1) to pay any money or (2) take any action regarding either *real* property or *tangible or intangible personal* property, even though the carrying out of such an action would involve doing an act and affecting a thing in a foreign state.

This general rule is stated in Restatement of the Law, "Conflict of Laws," Section 97, p. 147 under the title "Jurisdiction of Courts," where it said:

> "A state can exercise through its courts jurisdiction to order or to forbid the doing of an act within the state, *although to carry out the decree may involve doing the act or effecting a thing in another state.*" (Italics added.)

Or as it has otherwise been expressed:

> "If the thing required to be done is that which the defendant can do in this state, and there is the obligation of law upon on him to do it, the cases leave no doubt that this Court, acting on the person and not *in rem,* is not only competent but bound to make him him fulfill his obligation."

It has accordingly been frequently held in Illinois that an Illinois court may, by a decree *in personam,* enforce even a conveyance to plaintiff of real property situated in another state, provided only that the defendant is properly sued and served in Illinois.

Carter v. *Carter*, 283 Ill. 324;
Poole v. *Koons*, 252 Ill. 49;
Beavens v. *Murray*, 251 Ill. 603;
White Star Mining Co. v. *Hultberg*, 220 Ill. 578;
Sercomb v. *Catlin*, 128 Ill. 556.

These cases might be multiplied from all the other American jurisdictions; and the rule is the same in the Federal courts.

Clark v. *Iowa Fruit Co.*, 185 F. 604;
Byrne v. *Jones*, 159 F. 321.

Surely at this late date it cannot be seriously questioned that the Federal courts have power to require a defendant, properly sued and served within its jurisdiction, to turn over to an owner personal property owned by plaintiff, or to pay its value in money, in an action in *detinue*, wherever that property may be. *Hibbs* v. *Dunham*, 6 N. W. 719.

This right of a plaintiff to sue in a Federal court to recover his personal property, which is in the physical possession of defendant in another state, or its value, regardless of whether defendant may be exercising his physical dominion or possession of the property in such other state, and to require defendant to turn it or its value over to the true owner, was admitted by respondent in its brief in the trial court in this case. The precise language used by respondent in its brief to this effect was as follows:

> "It is perfectly true that had he (decedent), in his lifetime, *brought an action of detinue in the courts of Illinois*, Guaranty Trust Company would have had to surrender the property. This is so because he in his lifetime was the lawful owner, with complete title to these securities." (Italics added.)

A detinue suit is a proceeding *in personam* and not a proceeding *in rem;* and in the case at bar one of the prayers

for relief is for a decree requiring defendant "to pay to the plaintiff *the fair market value* of said securities, together with *damages* for their detention and together with the costs of this proceeding, and that judgment and execution issue thereon" (R. 11).

Since this civil action as in detinue is for money as well as property if the property is damaged or withheld, petitioner's claim *for money* is exactly the same as the administrator's claim *for money* in the *New England* and other cases in this Court. Respondent argued in the courts below that petitioner's claim was an action *in rem* rather than an action *in personam*. An action in detinue or in trover is not, as respondent contends, a proceeding *in rem*. It is an action or proceeding *in personam* which can be brought against any person withholding money or personal property, tangible or intangible, by or for the benefit of the true owner; and the defendant, when sued in such an action, cannot defend on the ground that it is exercising its physical possession of the property sued for, or which it has converted or is withholding, outside of the Federal court's jurisdiction.

The Circuit Court of Appeals appears to have fallen into the error of holding that the Federal Court in this case has insufficient jurisdiction *in personam* over the respondent to compel it (1) to turn over the physical personal property in its possession and control, or (2) to pay the money value thereof by judgment and execution, merely because petitioner holds ancillary letters of administration which confer only "a special and limited authority to act in collecting and disposing of such personal property as the decedent left within the confines of the State of Illinois." This flies squarely in the face of the decision of this Court in *New England Mutual Life Insurance*

Co. v. *Woodward*, 111 U. S. 138. For in that case the plaintiff was an *ancillary administrator*, and this Court found no difficulty in sustaining the jurisdiction of the Federal Court in Illinois to render a complete *in personam* decree against the Massachusetts corporate defendant, even though the defendant was an ancillary and not a domiciliary administrator. An ancillary administration was also involved in the case of *Smith* v. *New York Life Insurance Co.*, 57 F. 133; 67 F. 694 above cited.

Another argument which the respondent has made below (but which was not sustained in the Circuit Court of Appeals) is that the respondent in this case would not be protected from double liability in New York or elsewhere if the Illinois Federal Court in this case entered an *in personam* decree against the respondent.

But it has always been the law that where a defendant holding a decedent's assets is ordered by a court, having *in personam* jurisdiction of the defendant, to turn them over to either a domiciliary or ancillary administrator, compliance with that order is a bar to any other liability or claim upon the same assets.

Northwestern Mutual Life Ins. Co. v. *Johnson*, 275 Fed. 757;
L. & N. Ry. Co. v. *Jones*, 286 S. W. 1071;
Maas v. *German Savings Bank*, 176 N. Y. 377; 68 N. E. 658;
Rice v. *Metropolitan Life Ins. Co.*, 238 S. W. 772;
Talmage v. *Chapel*, 16 Mass. 69;
Chicago, etc. Ry. Co. v. *Schendel*, 270 U. S. 611;
Lewis v. *Adams*, 70 Cal. 403; 11 Pac. 833;
Hare v. *O'Brien*, 82 Atl. 475;
Hutchins v. *State Bank*, 12 Met. 421;
Fidelity Trust Co. v. *Williams*, 105 S. W. 952;
Valentine v. *Duke*, 222 Pac. 494;

Citizens National Bank v. *Sharp*, 53 Md. 521;
Compton's Administrator v. *Borderland Coal Co.*,
201 S. W. 20.

These cases hold that where an administrator, whether ancillary or domiciliary, sues to recover assets or their value in money in a state or Federal Court within the territorial jurisdiction of his appointment, and a judgment in such suit is entered in favor of the administrator so suing, the defendant is absolutely protected against any second suit which may be brought against the same defendant to recover the same assets or money in any other court any where.

Some of the foregoing cases, as we have said, involved ancillary administration and others involved domiciliary administration, the rule being similar in both cases. Moreover some of these cases related to the recovery of a money judgment, while others operated to the recovery of tangible or intangible property; and the rule was held equally applicable to both. Many of these cases even go so far as to hold that a *voluntary payment* to a domiciliary administrator, without any suit of any kind against the debtor, is adequate protection against double liability when asserted by an ancillary administrator elsewhere. It follows that a decree of court, if rendered in the Illinois Federal Court in this case, would be *a fortiorari* complete protection to respondent in paying the money or transferring the assets to petitioner which are sued for in this case.

There only remains to dispose of the argument that only in New York may these "kaffirs," or their value, be properly administered upon. This was not only the contention of respondent in the courts below, but was also a ground for the opinion in the Circuit Court of Appeals.

In the first place, petitioner points out that this sworn amended complaint specifically states (1) that no administration was ever commenced and no jurisdiction *in rem* or *in personam* was ever obtained by the New York Surrogate's Court; and (2) that ancillary administration in New York would under New York law be utterly useless and wasteful of the assets concerned and would be beyond the power or authority of the Surrogate's Court of New York, because the Surrogate's Court of New York has no power or authority to make any final distribution of the assets to decedent's ultimate heirs or distributees (R. 7-10).

In the second place, it has always been the law that *no ancillary administration is proper* in the absence of New York creditors; and petitioner's sworn Complaint squarely states that not only were there no New York creditors to justify the New York ancillary administration, but that there were no inheritance, succession or other taxes due in New York upon these assets (R. 7-9).

In Re Washburn's Estate, 47 N. W. 790 (Minn.);
Caruso v. *Caruso* (N. J.), 148 Atl. 882;
In Re Eaton's Will (Wis.), 202 N. W. 309;
Martin v. *Central Trust Co.,* 327 Ill. 622;
In Re Meyer's Estate, 211 N. Y. Supp. 525; affirmed 244 N. Y. 598.

It has moreover been held by both the State and Federal Courts in New York that an ancillary administrator in New York has no power to distribute the decedent's assets to his heirs or distributees unless all of the heirs or distributees reside in New York; and it is affirmatively alleged in petitioner's sworn Amended Complaint that the decedent's heirs and distributees are not all residents of New York (R. 4-5, 809).

Matter of Hughes, 95 N. Y. 55;
Lecouturier v. *Ickelheimer,* 205 Fed. 682.

It follows from these facts and from the foregoing authorities that an *ancillary* administration of this decedent's estate in New York would be utterly useless and improper, and as alleged in plaintiff's sworn Complaint, would be extremely expensive (R. 6, 9). The highest court of New York has decided in the case of *In Re Martin's Will,* 255 N. Y. 359; 174 N. W. 753, in a far-reaching decision by Judge Cardozo, that the costs and expenses of a useless *ancillary* administration are ample ground for refusal to permit such an administration. In his opinion in that case Judge Cardozo clearly held that there is no "absolute (exclusive) right" of administration; that "the unnecessary expenses of a double administration" which would necessitate "a wasteful duplication of administrations and accountings" was the very reason why administration "should be refused in the exercise of a sound discretion."

The New York courts have repeatedly held that it is only (1) where all of the next of kin reside in New York, and (2) when the rule of distribution of New York is identical with the rule of distribution in the domiciliary jurisdiction, that distribution will be permitted in New York.

Matter of Hughes, 95 N. Y. 55;
In Re Meyer's Estate, 211 N. Y. S. 525;
Matter of Worch's Estate, 208 N. Y. S. 652.

The latter two cases also hold, in conformity with Judge Cardozo's ruling in *In Re Martin's Will,* 255 N. Y. 359, that the New York court will wherever possible "*avoid the expense of double administration.*"

It was held in the trial court and in the Circuit Court of Appeals in this case that the Surrogate's Court of New York "first acquired and still retains jurisdiction over any assets belonging to Gabriel de Fontarce which at the time

of his death were located in the State of New York" (R. 113), because "that Court had assumed jurisdiction upon the filing of the petition", and that "it was its duty to retain that jurisdiction for the purpose of administering the assets within the state or transmitting them to the domiciliary executor or administrator when his identity was ascertained" (R. 148). Petitioner replies, first, that it is alleged in petitioner's sworn Amended Complaint that *no administration proceedings are pending in New York* "because no appointment of an administrator and no other action has ever been taken in said proceedings" and, second, that "said Surrogate Court of New York has not acquired any jurisdiction *in personam* over any representative of said estate or any jurisdiction *in rem* over any assets or securities or other properties of Gabriel de Fontarce whatsoever" (R. 10).

Moreover petitioner shows that Section 45 of the Surrogate's Court Act specifically states that the Surrogate's Court acquires exclusive jurisdiction over an estate only when "*letters testamentary or of administration have been duly issued*", and *not* by virtue of the mere *filing* of an *application for* administration *under which no appointment or other action has been had* (R. 10, 112, 143). Such cases as *Matter of Feinberg*, 280 N. Y. S. 540 hold that it is not merely the *filing of the petition*, but the *exercise of jurisdiction* through appointment of the administrator and the taking of the assets into *custodia legis* by him, *neither of which occurred in this case*, which gives the Surrogate exclusive jurisdiction.

It follows that the opinions of both the courts below in this case are erroneous in holding that *the mere filing of a petition upon which no action has been taken in New York* bars the entry of an effective *in personam* decree in this

case. Indeed petitioner's sworn Amended Complaint squarely alleges that the applicant in New York has in fact abandoned the New York Surrogate's proceedings and "would move to withdraw the same except for the fact that the said Surrogate has stated that he will refuse to permit such withdrawal" (R. 10).

CONCLUSION.

We conclude therefore:

1. That there is no want of authority in the District Court of the United States for the Northern District of Illinois, Eastern Division, to enter a valid order or decree *in personam* either (1) requiring respondent to transmit to petitionter the assets belonging to the decedent within its power and control wherever the same be located, or (2) to enter a money judgment and ordering execution for the monetary value thereof.

2. That a useless and expensive ancillary administration in New York which would serve no conceivable purpose, there being no New York creditors whatever, should be prevented and not fostered, especially where, as in this case, the New York Surrogate's Court has no power to make any final distribution of the assets in question.

Petitioner therefore prays that the decision of the Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the District Court dismissing the Amended Complaint should be reversed and the cause remanded to the trial court with instructions to proceed to a final decree therein.

Respectfully submitted,

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